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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1936

No. 505

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (a corporation),
*Petitioner,*

vs.

WILLIAM W. SCARLETT,
*Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court of the State of California.**

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### OPINION BELOW.

The opinion of the Supreme Court of the State of California is not yet officially reported. It is unofficially reported in 60 Pac. (2d) 462.

## JURISDICTION.

The judgment of the Supreme Court of the State of California was entered on August 7, 1936 (R. 304). Petition for certiorari was filed on November 2, 1936, and served on respondent on November 7, 1936.

Jurisdiction, if present, must come from section 237, of the Judicial Code as amended; but is not present because there is no substantial Federal question.

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## STATUTES INVOLVED.

The statutes involved are:

1. Federal Safety Appliance Act of 1910 (36 United States Statutes 298; U.S.C.A. Title 45, Sections 11 to 16); (27 United States Statutes 532; U.S.C.A. Title 45, Section 7); (35 United States Statutes 65; U.S.C.A. Title 45, Section 54).

2. Federal Employers' Liability Act, 35 United States Statutes 65; U.S.C.A. Title 45, Section 51.

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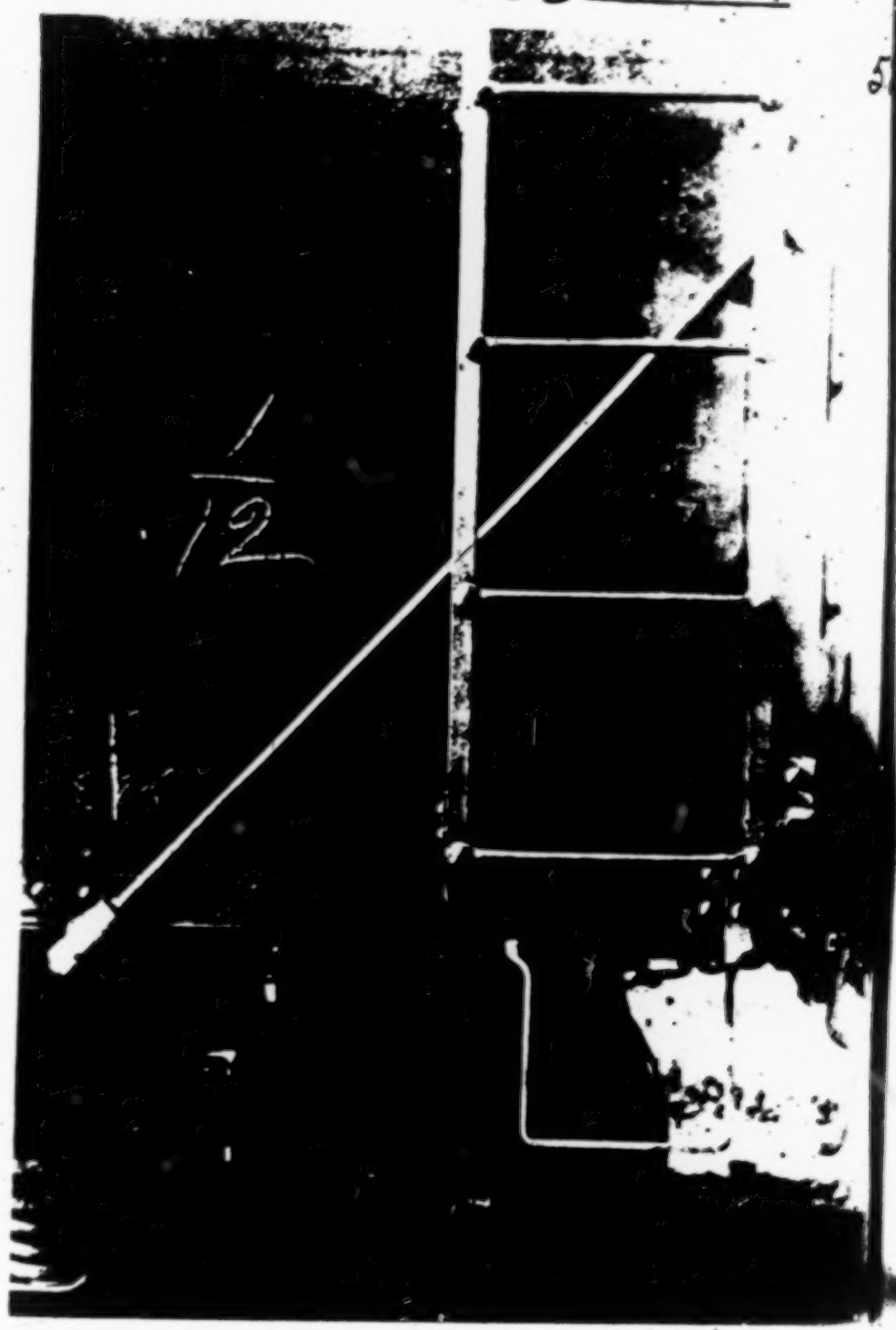
## QUESTION PRESENTED.

Was there any error in the decision of the Supreme Court of the State of California holding petitioner railway company responsible for damages caused by a defective safety appliance maintained in violation of the Safety Appliance Act, in a case where the safety appliance was shown to be defective in a respect *not* covered by any administrative regulations of the Interstate Commerce Commission?

Pltf. Exhibit
# 2
Scarlett vs G.T.J.F.Ry
# 1855-3



## STATEMENT OF THE CASE.

Respondent, a railroad brakeman, in the employ of petitioner railway company, while both were engaged in interstate commerce, in climbing down the side ladder, on a freight car of petitioner's train, at night in the performance of his duties, fell from the ladder, by reason of his right foot coming in contact with a round slanting, diagonal brace rod, extending outward from the car wall and inserted between the side wall of the car and the rungs of the ladder and behind the same and suffered the injuries for which the jury awarded him a verdict. The distance from the side of the box car to the inside of the diagonal brace rod was ⅞ of an inch; the diameter of the brace rod was 1⅛ inches; the distance from the outside of the brace rod to the inside of the rungs of the ladder was 2¾ inches (R. 30, 31). The angle or slant of the brace rod from the perpendicular was 45 degrees. The brace rod was first introduced by petitioner in 1929 and petitioner is the *only* railroad using this type of rod behind side ladders (R. 62). The universal method of bracing cars by other railroad companies is by the use of flat braces not standing out into space and not obstructing free movement of the brakemen ascending and descending side ladders (R. 281). See upper brace on photograph opposite page 6 of petition.

For no logical reason, petitioner inserted opposite page 6 of its petition a photograph *admittedly not taken from the record.* Opposite this page we insert plaintiff's exhibit 2, being a photograph of the type of ladder in question (Opp. R. 280).

## ARGUMENT.

### NO FEDERAL QUESTION OF SUBSTANCE, NOT HERETOFORE DETERMINED BY THIS COURT, IS INVOLVED, AND THE DECISION OF THE CALIFORNIA SUPREME COURT IS IN STRICT ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

The California Supreme Court, in this case, held that the question of the insecurity or safety of the ladder in use, was properly submitted as a question of fact to the jury, for the reason that the evidence disclosed a violation of the Safety Appliance Act, in that the presence of the diagonal brace rod as a part of the ladder, constituted the same a trap and unsafe and insecure for use. No question of compliance with the Interstate Commerce Commission's requirements was involved. The question of the clearance between the rod and rungs of the ladder was not an issue. The presence of the diaganal brace rod as a part of the ladder was *not* a matter administratively regulated by the Interstate Commerce Commission.

This Court has held that, in the absence of such regulation, Section 2 of the Safety Appliance Act imposes a duty on railroad companies to maintain among other devices, secure and safe ladders, and that this duty extends along with the duty to comply with such administrative regulations as the Interstate Commerce Commission might promulgate to secure uniformity of practice.

*Ill. Central R. R. v. Williams,* 242 U. S. 462, 61 L. Ed. 437.

Other cases following the *Ill. Central R. R. v. Williams* case, supra, are:

*B. & O. R. R. v. Groeger,* 266 U. S. 521, 288 Fed. 321;

*Gerow v. Seaboard Airlines,* 128 S. E. 345; 189 N. C. 813;
*Davis v. Reynolds,* 280 Fed. 363;
*Tyon v. Wabash Ry.,* 232 S. W. 786.

The decision of the California Supreme Court is not in conflict with any of the decisions cited by petitioner in its brief, as all of such decisions involve cases, where the issue was whether or not an administrative regulation of the Interstate Commerce Commission was complied with.

Respondent did not claim, nor was there any issue raised by the pleadings, or at the trial, that his injury was due to the failure on the part of the railroad company, to comply with any administrative regulation of the Interstate Commerce Commission, with respect to clearance.

The issue raised, and the issue submitted to the jury, was that the railroad company maintained an insecure or unsafe ladder, in violation of the Safety Appliance Act, by inserting in and as a part of the ladder, a device constituting a trap and making the ladder, thereby unsafe and insecure for use. This involved a matter of insecure or unsafe construction of the ladder in a respect *not* covered by any regulation of the Interstate Commerce Commission.

The California Supreme Court correctly held that the cause presented a pure question of fact, which was properly submitted to the jury for determination. Petitioner's sole claim therefore arises out of a simple question of fact properly submitted to the jury, and therefore there is no question of importance or substance calling for the consideration of this court.

Furthermore, that the decision of the California Supreme Court is not in accord with applicable decisions of the Federal courts and other state courts, even if true, is not a ground for certiorari.

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**CONCLUSION.**

This case is not important as involving any question of law, which bespeaks the attention of this court under Subdivision 5-a of Rule 38, of this court. No Federal question of substance, not heretofore determined by this court, is involved, nor is the decision not in accord with applicable decisions of this court. The simple question of fact here involved was decided by the state court, clearly according to applicable decisions of this court. Nowhere does petitioner indicate (and clearly it cannot do so) that any new important substantial question has arisen in this simple case.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Dated, San Francisco, California,
November 20, 1936.

Respectfully submitted,
HERMAN A. BACHRACK,
*Attorney for Respondent.*

LOUIS E. GOODMAN,
LOUIS H. BROWNSTONE,
CLIFTON HILDEBRAND,
*Of Counsel.*

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